Transnational Dispute Management
www.transnational-dispute-management.com
Volume 10 - Issue #01 – January 2013

Table of Contents

TDM is supported by the **IBA** and **CEPMLP**

ALIGNING HUMAN RIGHTS AND INVESTMENT PROTECTION

Foreign Investments & Human Rights - The Actors and Their Different Roles

Professor Dr. Ursula Kriebaum
University of Vienna

Introduction

Human rights law and international investment law have developed as two separate disciplines. But, despite a certain tendency of fragmentation, these two fields of international law are not hermetically separated. They have the same common goal: the protection of the right to property, which is also a human right. Human rights have the potential to protect opposite sides in certain scenarios: they may operate in favour of investors or against them where investment operations interfere with human rights of the population of the host State.

This article analyses the different possible scenarios. The actors involved: foreign investor, host State, host State's population; their roles as victims, perpetrators and, bystanders; and the different settings in which violations of human rights law and investment law can be invoked: human rights courts and investment arbitration tribunals.

The article's main thesis is that both investment tribunals and human rights courts have a common project: fostering the rule of law. In each of the two fields of law the other field can and should have a certain role to play, without taking centre stage.

↳ Full article here

Balancing Human Rights and Investment Obligations: An Old Wives' Tale

Devashish Krishan
www.devkrishan.com

Introduction

This is the winning submission for Steve Weston Prize 2011. The essay subject for 2011 was: "In its award in proceedings between Suez (and others) v Argentine Republic (Case No ARB/03/19 dated 30th July 2010) the ICSID Tribunal stated: "Argentina is subject to both international obligations i.e.human rights and treaty obligation [sic], and must respect both of them equally. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive".

Consider how human rights and treaty obligations may be balanced through the application of the principle of proportionality, particularly in the context of settlement of disputes relating to concession contracts for oil and gas exploration."

More information about the Steve Weston Prize at http://www.dundee.ac.uk/cepmlp/gateway/index.php?news=32043

Full article here

Some Thoughts on Foreign Investors' Responsibilities to Respect Human Rights

Stephanie Barbara Leinhardt
University of Basel

Introduction

Human rights (HR) law as well as international investment law (IIL) have seen considerable changes in recent years and have become increasingly aware of corporate investors' social responsibilities. Due to the lack of international consensus or will to adopt a legally binding framework to address transnational corporations' (TNCs) HR obligations , discussion of investors' social responsibilities are considered to be moral or ethically based.

This paper aims to illustrate what it means that transnational corporations (TNCs) are subject to responsibilities for HR if they're investing abroad and how these responsibilities could be taken into account in the realm of international investment arbitration. As an international legal regime concerned with investors' rights, IIL should start to consider investors' responsibilities in order to counter criticism regarding its one-sided protection of interests.

The paper consists of three parts. Part (I.) outlines investors' responsibility to respect HR. A discussion of the interaction between HR law and IIL is developed in Part (II.) and concluding remarks comprise Part (III.) of the paper.

Footnotes omitted from this introduction.

Full article here

The 'Human Nature' of International Investment Law

Dr. Yannick Radi
Leiden University, Grotius Centre for International Legal Studies

Introduction

In the context of the 'fragmentation' narrative, international law regimes are often perceived as homogeneous, both in terms of the objective they pursue and the people who compose them. Such is the case of international investment law (IIL) that is usually depicted as an investor-oriented setting and whose adjudicators are at times portrayed as constituting a homogeneous college. Therefore, it comes as no surprise that the relationships between IIL and human rights are addressed by mainstream literature as a matter of interaction between two different legal and social settings. In this article, I propose a different way of approaching and analyzing these relationships. Instead of conceiving of IIL and human rights as two different settings and focusing on how human rights can be incorporated within the IIL regime, it examines indeed the human rights dimension of IIL. By doing so, my objective is twofold. First, I aim at unraveling the human rights components this regime is made of. Second, I intend to demonstrate that the human rights dimension of the IIL regime has yet the potential to gain more importance because of the recent evolutions known by IIL.

To reach this objective and thereby reveal the 'human nature' of IIL, I analyze this regime through two lenses: normative and arbitral. As for the normative lens, it is my objective to shed light on the human rights dimension of the norms provided in international investment agreements (IIAs). In the context of this discussion, I claim for a double paradigmatic shift in the discourse of international (investment) lawyers. The first one relates to the 'conflict' discourse that has been capturing international legal scholarship for more than a decade. Indeed, I argue that the conflicting situations that arbitration tribunals are faced with are better conceived of in terms of a conflict of interests than in terms of a conflict of norms. In relation to this, the second paradigmatic shift concerns the way the law-application process is conceptualized. I put forth the idea that this process should be regarded as an argumentative process, more than as an interpretative one (Section 2). To illustrate the practical dimension of this double paradigmatic shift, I analyze various scenarios raising the question of the violation of the norms on indirect expropriation and the fair and equitable treatment (FET) by a human rights state measure. I then proceed with the analysis of the 'human nature' of IIL by focusing on investment arbitration. In light of the study of the evolution of the regime, I highlight the impact of this evolution on the profile of arbitrators and features of arbitration proceedings and analyze how these evolutions reinforce the 'human nature' of IIL (Section 3).

Footnotes omitted from this introduction.

Full article here

Is it Time to Integrate Non-investment Concerns into International Investment Law?

Pia Acconci
University of Teramo

Introduction

As current international investment law regulates the conduct of heterogeneous actors, one debated issue is how to combine their different interests and expectations, in particular those of the private investors, and those of the host States, which are in principle public ones.

Defining public interests at an international law level is an old problem to which a solution has not yet been found.

In international investment law the existence of public interest tends to be required as one of the typical requirements that a State has to satisfy if it wishes to lawfully expropriate/nationalize a foreign investment. The majority of investment treaties refer to such a requirement without defining it.

I refer to public interests as those related to the protection of non-investment concerns, such as the protection of the environment and human rights. These concerns have become very important in the last decade owing to some changes which have occurred in the international practice.

Footnotes omitted from this introduction.

Full article here

Conflict of Treaties, Interpretation, and Decision-Making on Human Rights and Investment During Economic Crises

Professor Diane A. Desierto
Peking University School of Transnational Law (PKU-STL)

Abstract

This article explores the problem of human rights compliance amid the host State's investment obligations during economic emergencies. It focuses on the narrow problematique of achieving compliance with the "minimum core obligation" under the International Covenant on Economic, Social, and Cultural Rights (ICESCR) despite the simultaneous pendency of the investment treaty obligation of a host State to provide compensation to investors for breaches of expropriation and non-expropriation provisions in an investment treaty.

Part I (ICESCR Applicability in Economic Emergencies) establishes the continuing binding force of the ICESCR minimum core obligation during economic emergencies, and the determinability of its content on a case-to-case basis by States Parties to the ICESCR.

Part II (Conflict of Treaties and VCLT Article 30: the ICESCR and the Investment Treaty) of the article then proceeds to show that host States' authoritative decision-makers could view the situation as one of direct incompatibility between treaty norms, which should trigger the application of Article 30 of the Vienna Convention on the Law of Treaties (VCLT), and not a counter-productive argument based on the alleged "jus cogens" nature of the ICESCR.

Part III (VCLT Article 31 and ICESCR-Sensitive Investment Treaty Interpretation) demonstrates an alternative, where the host State treats the situation as one calling for harmonization of investment treaty standards with the ICESCR, although this method may be more suitable to the "in accordance with host State law" clauses in investment treaties, as opposed to the usual guarantees of fair and equitable treatment (FET) or non-discrimination. Part IV (The Principle of Political Decision: Host States and the Realist Calculus of Treaty Compliance) examines an alternative scenario where the host State finds itself restrictively besieged during an economic emergency, to the extent that using its fiscal resources to perform one international obligation would utterly incapacitate it from performing the other at the same time. Faced as such with the "principle of political decision", the article shows that the preference of authoritative decision-makers cannot be made ex ante but only according to the contextual parameters of its particular exigency, taking into account the elements of the established process of authoritative decision- making.

In the Conclusion (Investment, Welfare, and Economic Emergencies), I show that the new generations of international investment agreements (IIAs) have begun to purposely design human rights-sensitive provisions in the substantive guarantees of these treaties, which may suggest areas for future research.

Full article here

Bridging the Public Interest Divide: Committee Assistance for Investor-host State Compliance with the ICESCR

Professor Bruno Simma
Michigan Law School

Professor Diane A. Desierto
Peking University School of Transnational Law (PKU-STL)

Introduction

What the authors want to sketch out in this essay in honor of Eibe Riedel is the way in which the policy dialogue between States, investors, and other public interest constituents could be advanced further through the use of a hitherto untapped international institutional source of expertise on social and economic rights. We refer to the Committee on Economic, Social and Cultural Rights, the monitoring body created in 1985 and in operation since 1987, entrusted with overseeing the implementation of the International Covenant on Economic, Social and Cultural Rights of 19 December 1966 (the "ICESCR") by its States parties. Bruno Simma was the German

member of this Committee for the initial ten years of its existence; followed by the recipient of this Festschrift who, during the many years of his membership in the Committee, has made significant contributions towards the establishment of the present high reputation of this body. In this paper, the authors will develop the thesis that the Committee could render substantial assistance to host States as well as investors towards the development of a transparent and cooperative understanding of ICESCR protection within and alongside investment treaty obligations.

As the authoritative body of experts tasked with assisting the UN Economic and Social Council in monitoring States Parties' ICESCR compliance, the Committee could thus help inform the content and design of international investment agreements towards better harmonization with State Party obligations under the ICESCR. Under the familiar typology of the obligations to "respect", "protect", and "fulfill" the rights enshrined in the Covenant, the Committee could extend advisory assistance to States to clarify the content of ICESCR obligations, in order to enable them to consider ex ante the consequences of international investment agreements and foreign investment contracts for a host State's fulfillment of its ICESCR obligations.

Footnotes omitted from this introduction.

Full article here

The Conventionality Control of Investment Arbitrations: Enhancing Coherence Through Dialogue

Juan Pablo Bohoslavsky
UNCTAD

Juan Bautista Justo
Universidad Nacional del Comahue

Conflicts between human rights and foreign investors' rights

The simultaneous submission of a state to the international human rights systems and foreign investment regimes can generate a dilemma for governments, which becomes tangible when subjected to claims from those two fronts: either the state is liable for not taking the measures that are required by human rights covenants, or it does so by taking such actions and thus, affecting the interests of investors.

To some extent, this dilemma corresponds to a practice of arbitral tribunals that are responsible for interpreting and applying the Bilateral Investment Treaties (BITs). This arbitral activity frequently consists of considering such arrangements as areas immune to the application of human rights treaties. This dissociation leads to classifying certain national human rights protective measures as violations of BITs and thereby imposing stiff awards to states.

Far from being a lab scenario, the potential conflict between the obligations of BITs and human rights covenants emerged explicitly and forcefully in the recent dispute involving thousands of Ecuadorians, their government and the oil multinational Chevron. In 2012, a court in that country decided to reject the request made by an arbitration panel to suspend a local judgment condemning Chevron to pay around 18,000 USD million for environmental damage caused affecting over 30,000 people.

Ecuadorian judges clearly stated the policy dilemma here discussed: "On one hand, the binding force for the Ecuadorian state of arbitral awards (in investment), and secondly, the effective enjoyment of human rights". They did not hesitate to conclude that, between complying with the award and ensuring effective judicial protection enshrined in Art. 25 of the American Convention on Human Rights (ACHR), the latter should prevail.

The rise of such conflicts in the international law arena (which is manifested not only in international courts but also in national ones, and between the first and the second) not only confirms the palpable reality of the quandary that some insist to rate as hypothetical, but also highlights the need to avoid the application of BITs as a chilling factor of the active role of governments that human rights actually demand.

Using the Inter American model, this essay proposes the conventionality control of arbitral awards -i.e. the verification of their compatibility with human rights treaties- as one of the ways to prevent this from happening, while enhancing the coherence of the overall international legal system through more dialogue among judicial and quasi-judicial bodies that have a say in foreign investment issues. In that vein, it presents a typology of BITs - human rights conflicting scenarios and describes the role that in the conventionality control falls to the arbitrators, domestic and international courts.

Footnotes omitted from this introduction.

Full article here

The Doctrine of "Clean Hands" and the Inadmissibility of Claims by Investors Breaching International Human Rights Law

Patrick Dumberry
Gabrielle Dumas-Aubin

Faculty of Law, University of Ottawa

Introduction

The "clean hands" doctrine has been defined as "an important principle of international law that ha[s] to be taken into account whenever there [i]s evidence that an applicant State ha[s] not acted in good faith and that it ha[s] come to court with unclean hands." It originated from the general principle of good faith. The application of the "clean hands" doctrine in international law is still controversial. In the context of state responsibility, the ILC Special Rapporteur James Crawford explained that "if it exist[s] at all," the doctrine would operate as a ground of inadmissibility rather than as a

circumstance precluding wrongfulness or responsibility. International tribunals have so far been reluctant to recognize its existence. Its inconsistency has indeed been underlined in the recent PCA arbitration between Guyana and Suriname which indicated that "the use of the clean hands doctrine has been sparse, and its application in the instances in which it has been invoked has been inconsistent." For these reasons, the ILC Special Rapporteur Crawford concluded (quoting Rousseau) that "it is not possible to consider the 'clean hands' theory as an institution of general customary law."

Although it has been rarely applied , there is nevertheless some support for the doctrine of clean hands in the opinions of several individual judges of international tribunals. These include the separate opinion of Judge Hudson and the dissenting opinion of Judge Anzilotti in the case of The Diversion of Water from the Meuse. The principle has also been endorsed by several judges of the International Court of Justice (ICJ) in their dissenting opinions, as well as by several scholars. In any event, the principle has never been formally rejected by the ICJ.

What is clear is the fact that the doctrine of "clean hands" has been recognized in the domestic orders of many States. As a result, it has been qualified by many, including Judges Schwebel and Anzilotti, as a general principle of law. As such, the doctrine of clean hands is a source of law that can be applied by international tribunals in accordance with Article 38(1)(c) of the ICJ Statute. Nothing therefore prevents an arbitral tribunal in the context of an investor-State arbitration from referring to the doctrine.

This first part of this short paper briefly examines how arbitral tribunals in the context of investor-state arbitration have already made use of the clean hands doctrine to determine questions of admissibility/jurisdiction involving illegal conduct by an investor. The second part focuses on how tribunals should in the future make use of the "clean hands" doctrine to find inadmissible claims involving human rights violations committed by an investor against citizens of the host State in the context of its investment.

Footnotes omitted from this introduction.

Full article here

Investing in Human Rights Protection - The Soundest Investment of All?

Ayesha Dias
Consultant UNDP and Global Faculty, CEPMLP, University of Dundee

Introduction

This paper focuses on human rights issues linked to (primarily, but not necessarily exclusively, foreign) investments in the mineral extractive industry in developing countries. It does so because the mineral extractive industry in developing countries is especially pertinent to the subject of this volume for several reasons. Firstly, the mineral extractive industry in developing countries poses threats and unique challenges, as well as opportunities regarding sustainable development, good governance, non-discrimination, inclusion and participation, and the protection and promotion of human rights. Secondly, the concepts of "investment' and "investment protection" have special dimensions in the mineral extractive industry in developing countries given the different forms that such investment might take: foreign direct investment, joint ventures, concession agreements, "good neighbor agreements"; and the different sources that such investment might take: foreign/domestic private, domestic public, mine workers, mining communities, consumer's, etc. The investment risks differ, and may take literally physical form as the Bougainville Copper mine history so vividly demonstrates. Special issues also relate to how to protect such investment. Both the Shell Oil experience in Nigeria and the Conzinc Riotinto (Australia) experience in Bougainville demonstrate the pitfalls of investment protection by use of physical, armed force.

Thirdly, minerals and energy resources are vital to modern-day life. Minerals development is essential, since it provides resources which can be sold, domestically and internationally to raise much-needed revenue (and in some cases much-needed foreign exchange) to finance programs of poverty alleviation and programs to deliver services to meet basic human needs such as food, clothing, education, health and housing. It is also essential to produce raw materials and energy needed for industrialization in the manufacturing and chemicals sectors. Yet, minerals development carries with it unavoidable environmental and social costs at every stage from exploration, to excavation, to extraction, to beneficiation, to transport and sale. For most developing countries the development of their minerals involves a social, environmental, cultural, political-legal and economic paradox, as we elaborate in the following section of the paper. Fourthly, in many resource-endowed developing countries such resource endowment has proved to be both a blessing and a curse. Resource-endowment is an undoubted blessing for the poorest and least developed countries since it offers a way out of poverty and lack of development. But all too often, such resource-endowment has resulted in the curse of resource-dependency, as we also elaborate below.

Footnotes omitted from this introduction.

Full article here

Human Rights Arguments in Amicus Curiae Submissions: Analysis of ICSID and NAFTA Investor-State Arbitrations

Sarah Schadendorf
Bucerius Law School, Hamburg

Introduction

The submission and admission of amicus curiae briefs in international investment arbitration proceedings is a recent trend and heavily contested. This article will not focus on the theoretical questions of whether amicus curiae participation is desirable in or compatible with international investor-state arbitration. It will rather examine the existing practice of dealing with amicus curiae submissions and their human rights related contents. The aim is to evaluate whether these written statements by various civil society actors are an effective means for promoting human rights concerns in the investment law context.

First of all, it will be defined which kind of and whose human rights can be at issue in international investor-state disputes and may thus serve as arguments. In a second step, the article will trace the development of amicus curiae participation before NAFTA and ICSID investment tribunals. This section will illustrate the conditions for the admission of amicus briefs as they were set out by the tribunals and laid down in legal documents and examine the rationale for accepting submissions from amici curiae. Special attention will be paid to a very recent decision of two (identically constituted) ICSID tribunals whose strict view on the admission of human rights related amicus briefs in international investment arbitration is worth discussing. The third part will be dedicated to an analysis of the submitted amicus briefs as well as the tribunals' procedural orders, decisions and awards in NAFTA and ICSID proceedings. This section will explore which human rights the amici refer to and in how far the tribunals respond to the alleged human rights arguments.

This rather empirical approach is supposed to evaluate the factual relevance and influence of amicus briefs containing human rights arguments and will thus enrich (and maybe either relativize or fuel) the theoretical debate on advantages and disadvantages of amicus participation. The results will help to assess the impact of human rights related amicus submissions on contemporary investment arbitration proceedings and international investment law in general.

Footnotes omitted from this introduction.

Full article here

Human Rights Law and BIT Protection: Areas of Convergence

Timothy G. Nelson
Skadden, Arps, Slate, Meagher & Flom LLP

Introduction

It has become fashionable, in some quarters, to attack the present worldwide system of investment protection as represented by the many thousands of bilateral investment treaties ("BITS") existing worldwide. Critics of these BITs - who are often similarly hostile to investor-state arbitration - sometimes claim that a host state's recognition of the rights of foreign investors is prejudicial to human rights in the host state. For the most part, this is a policy debate - as evident, for example, from the recent debate within the U.S. concerning whether the US Model BIT needs to be amended to incorporate environmental or labor concerns. This debate may well continue, as will the separate discussion over "corporate responsibility" for human rights currently being overseen by United Nations Special Representative John Ruggie.

From a legal perspective, some of these criticisms are surprising. At their core, BITs contain a series of obligations owed by the host state towards investors, including the obligation to compensate for expropriation, to treat investors fairly, to afford them physical security and (in many cases) to refrain from discriminating against them on grounds of nationality. To date, no international court or tribunal has held that this bundle of rights should "trump" the human right of its own citizens. On the contrary, a recent ICSID tribunal held that "[the host state's] human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive," and "[it] must respect both of them."

The suggestion of an "inconsistency" between these strands of law is also surprising when one takes into account their common lineage in the customary international law related to treatment of aliens. Indeed, many provisions of human rights treaties expressly provide for the protection of property, in terms similar to the customary international law standard. This convergence, in turn, means that case law from one area of law is potentially useful in the other - indeed, in some cases, it is interchangeable.

Footnotes omitted from this introduction.
Originally published by Koninklijke Brill NV in Journal of World Investment & Trade, vol. 11 (2011).
Republished with kind permission.

Full article here

Transnational Dispute Management

Published issues and specials:

- TDM 5 (2012) - Legal Issues in Tobacco Control
- TDM 4 (2012) - 7th Biennial Symposium on International Arbitration and Dispute Resolution
- TDM 3 (2012) - Regular issue
- TDM 2 (2012) - FDI Moot 2011
- TDM 1 (2012) - A Liber Amicorum: Thomas Wälde - Law Beyond Conventional Thought (free book)
- TDM 5 (2011) - Resolving International Business Disputes by ADR in Asia
- TDM 4 (2011) - Contingent Fees and Third Party Funding in Investment Arbitration Disputes
- TDM 3 (2011) - Intersections: Dissemblance or Convergence between International Trade and Investment Law
- TDM 2 (2011)
- TDM 1 (2011)
- TDM 4 (2010) - China
- TDM 3 (2010) - FDI Moot 2010
- TDM 2 (2010) - Guerrilla Tactics in International Arbitration & Litigation
- TDM 1 (2010)
- TDM 4 (2009) - Latin America
- TDM 3 (2009) - NAFTA - Fifteen Years Later. Experiences and Future
- TDM 2 (2009) - The Protection of Intellectual Property Rights through International Investments Agreements
- TDM 1 (2009)
- TDM 4 (2008) - Arbitrator Bias
- TDM 3 (2008) - Precedent in Investment Arbitration
- TDM 2 (2008) - Venezuela: The battle of Contract Sanctity vs. Resource Sovereignty
- TDM 1 (2008) - UNCTAD Expert Meeting on Development Implications of International Investment Rule Making
- TDM 6 (2007) - Compensation and Damages in International Investment Arbitration
- TDM 5 (2007)
- TDM 4 (2007) - The Hague 2004 Investment Seminar
- TDM 3 (2007) - Energy Litigation and Arbitration - Expert Perspectives
- TDM 2 (2007) - The Legacy and Lessons of Distressed and Failed Infrastructure Investments during the 1990s
- TDM 1 (2007) - Arbitration & Mediation
- TDM 5 (2006)
- TDM 4 (2006) - Alternative Dispute Resolution in Asia
- TDM 3 (2006) - International Investment Law at a Crossroads (Harvard International Law Society)
- TDM 2 (2006)
- TDM 1 (2006) - Litigating Across Borders: Hot Topics and Recent Developments in Transnational Litigation
- TDM 5 (2005)
- TDM 4 (2005)
- TDM 3 (2005) - Relationship Between Local Courts and Investment Treaty Arbitration
- TDM 2 (2005) - Appeals and Challenges to Investment Treaty Awards
- TDM 1 (2005)
- TDM 4 (2004)
- TDM 3 (2004)
- TDM 2 (2004)
- TDM 1 (2004)

Oil, Gas and Energy Law (OGEL, ISSN 1875-418X) focuses on oil-gas-energy law, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting, including the oil-gas-energy geopolitics. See www.ogel.org for more details on published issues and details on how to contribute.